



The bunker supplier, the owner and a maritime lien – some remarks from the German perspective

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The downturn of the shipping market and the financial difficulties faced by charterers following therefrom have increased the number of cases in which bunker suppliers are seeking to enforce an alleged maritime lien. The recent demise of OW Bunker further fuelled this development.

In the following we pinpoint some aspects usually relevant in international bunkering cases from a German perspective.

1. Does German law provide a maritime lien in favour of a bunker supplier?

No, a maritime lien is only granted for certain claims comprehensively enumerated in section 596 German Commercial Code. Further, a maritime lien cannot be created by agreement.

2. How does German law treat foreign maritime liens?

In principle, foreign maritime liens are recognised in Germany.

Whether a foreign maritime lien does exist is decided based on the law applicable to the legal relationship from which the maritime lien is said to stem.

Example: A bunker supplier claims that the bunkering contract is subject to Danish law and that Danish law grants a maritime lien in his favour. German courts will ascertain whether indeed Danish law applies and whether it does grant a maritime lien.

In other words: German courts will recognise a lien granted under foreign law even if the legal relationship would not give rise to a maritime lien under German material law.

3. How does a German court determine which law to apply?

A German court will, in accordance with the European Rome I Regulation (Regulation (EC) No 593/2008), first look for a choice of law agreement. Provided the prerequisites (including formal and material validity) are met, the law chosen will be applied.

In the absence of a valid choice of law, the court will apply the law of the country where the seller has his habitual residence as per Art. 19 Rome I Regulation. Seller is the contractual bunker supplier and thus not necessarily the party actually delivering the bunkers to the vessel.

4. What if a charterer concluded a bunkering contract containing a choice of law clause – does the law chosen also rule the relationship between the bunker supplier and the owner?

Generally speaking, a choice of law - just like a forum selection agreement - is an agreement legally separate from the underlying contract. As it is beyond the powers of two parties to bind a third party to an agreement, there is no basis to extend a choice of law clause between the charterer and the bunker supplier onto the owner.

The European Court of Justice has recently decided in the matter of Refcomp SpA v Axa Corporate Solutions Assurance SA, and others

“that the jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract. In order for a third party to rely on the clause it is, in principle, necessary that the third party has given his consent to that effect.”

It is consistent with this decision to limit the effect of a choice of law clause to the contracting parties. Consequently, the owner is not bound to the agreement be-



tween the charterer and the bunker supplier unless he gave his consent thereto. Even more so when the choice of law is detrimental to the owner, for example by making a law applicable that gives rise to a maritime lien. In such cases the choice of law would also constitute a contract to the detriment of a third party and such contracts are as a matter of principle of no legal consequence for the third party, namely the owner.

5. Are there any other aspects of possible relevance?

It may be interesting to note the approach taken in particular by German courts on the inclusion of general terms and conditions in cases ruled by the UN Convention on the International Sales of Goods (CISG).

It has repeatedly been held that general terms and conditions have to be supplied to the other party in order to make them part of a CISG sales contract. German courts have in particular held that it is insufficient to just refer the other party to terms and conditions. Rather, terms and conditions have to be made available to the other party. It is quite possible that these requirements have not been met in the negotiation and conclusion of the bunkering contract so that the general terms and conditions of the bunker supplier may not be applicable.

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